No. 17035

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

KENNETH EUGENE GIBBS AND RONALD CHARLES WACHS, APPELLEES

BRIEF FOR APPELLANT

UNITED STATES OF AMERICA, PETITIONER

v.

HONORABLE JAMES M. CARTER, RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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OPINIONS BELOW

There was no opinion by the court below. The judgment of the District Court for the Southern District of California is printed at pp. 7–9 of the Record. The order of the District Court denying the Government's motion to correct an illegal sentence is found at pp. 13, 14 of the Record.

JURISDICTION

This Court has jurisdiction of the appeal under 28 U.S.C. 1291. It has jurisdiction to issue a writ of mandamus under 28 U.S.C. 1651.[1]

STATEMENT OF THE CASE

On March 30, 1960, Kenneth Eugene Gibbs and Ronald Charles Wachs were indicted in the District Court for the Southern District of California for the illegal importation of marihuana, a violation of 21 U.S.C. 176(a). They were convicted upon their pleas of guilty and on May 16, 1960, Judge James A. Carter suspended the imposition of sentence and placed them on probation for a period of five years, relying upon the Youth Corrections Act, 18 U.S.C. 5010(a).

On May 18, 1960, the Government filed a motion under Rule 35 to correct the sentence (R. 10). The court denied the motion on May 24, 1960 (R. 12). This appeal and petition for writ of mandamus followed.

SPECIFICATION OF ERROR

The District Court erred in suspending the imposition of sentence and in placing the defendants on probation.

SUMMARY OF ARGUMENT

The Narcotics Act of 1956 specifically prohibits suspension of the imposition of sentence and the granting of probation in cases where the defendant has been convicted of the illegal importation of marihuana.

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[1] The jurisdiction of the Court is discussed in detail at pp. 11–17, *infra*.

Section 5010(a) of the Youth Corrections Act of 1950 did not confer power to grant probation to youth offenders. The only purpose of section 5010(a) was to make clear that the new type of treatment afforded by the Youth Corrections Act did not override the power previously granted by section 3651; it did not constitute a new and independent grant of power. Youth offenders are not excepted from the prohibition of the Narcotics Act and the order placing the defendant on probation is void.

The United States has the right to appeal this decision under 28 U.S.C. 1291. Although this is a criminal case, appeal from the order involved here comes within the exceptions to the limitations of the Criminal Appeals Act. Even if there is no right of appeal, this Court may grant relief in the nature of a writ of mandamus.

ARGUMENT

I. The judgment of the district court suspending the imposition of sentence and placing the defendant on probation was illegal

The defendants were convicted of a violation of 21 U.S.C. 176(a), which was enacted as subsection (h) of section 2 of the Narcotic Drugs Import and Export Act of 1956. This legislation eliminated certain previously available sentencing alternatives even with respect to a first offense violation of section (176a). As codified in 26 U.S.C. 7237(d), it states:

> Upon conviction (1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Ex-

> port Act, as amended, or such Act of July 11, 1941, as amended, or (2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense, the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 42–201 and following), as amended, shall not apply.

It is clear from the above language that suspension of the imposition of sentence and the grant of probation to an offender convicted of a violation of 21 U.S.C. 176(a) would be invalid. Cf. *Deutschmann* v. *United States,* 254 F. 2d 487, 488 (9th Cir., 1958); *Lathem* v. *United States,* 259 F. 2d 393, 396–397 (5th Cir., 1958).

It will be noted that the language of the statute is sweeping and all-inclusive and that it allows for no exceptions. In particular, no specific exception is made for the benefit of youth offenders, and there is nothing in the language from which such an exception could be implied.[2]

The conclusion that the prohibition on suspension of the imposition of sentence and the granting of probation applies to all offenders, convicted of the

[2] By way of comparison, the prohibition in 26 U.S.C. 7237(d) is specific as to certain parole statutes, but general as to probation (18 U.S.C. 4202 is mentioned, but not 18 U.S.C. 5015 of the Youth Correction Act). This compels two conclusions: (1) there is only one probation grant; (2) if there were more than one probation grant, all such grants are included in the prohibition.

offenses specified in section 7237(d), regardless of age, is fortified by the legislative history of the Narcotics Act. That history makes it abundantly clear that Congress not only had no intention of exempting youth offenders from the prohibition against probation but that it specifically intended to reach such offenders under the new provisions. Typical of many comments to that effect is the following one, found in House Report No. 2388 of the Committee on Ways and Means to accompany H.R. 11619 (Vol. 2, U.S. Code Cong. & Ad. News, 84th Cong., 2d Sess., pp. 3274, 3303–3304):

> * * * We have adduced substantial evidence that because of the severe penalties on repeating offenders and the fact that suspension and probation are not available in the case of an individual with a record of prior narcotic convictions there has been an increase in first offender traffickers. Repeating offenders subject to the heavier mandatory penalties under the Boggs law have moved into the background and recruited *young hoodlums* as peddlers in the narcotic traffic. These recruits are subject to the minimum mandatory sentence of 2 years with the possibility of suspension or probation * * * The majority of these individuals have prior records of crime * * * With the possibility of receiving probation or a suspended sentence, these unscrupulous individuals are willing to risk apprehension for the fantastic profits derived from this type of crime * * * Unless immediate action is taken to prohibit probation or suspension of sentence, it is the subcommittee's considered opinion that the

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> first-offender peddler problem will become progressively worse and eventually lead to the large-scale recruiting of our *youth* by the upper echelon of traffickers. [Emphasis added.]

Clearly, Congress intended that narcotics offenders, whether of the youthful variety or otherwise, would not be eligible for probation.

In his judgment suspending the imposition of sentence and placing the defendant on probation, Judge Carter cited a provision in the Youth Corrections Act, 18 U.S.C. 5010(a), as his statutory authority. This subsection provides:

> (a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

As indicated, the prohibition of the 1956 narcotics statute is specific and admits of no exception. Certainly, no exception should be implied by virtue of a youth rehabilitation statute enacted six years earlier where the history of the later statute make it plain that youth offenders were among the very groups which were intended to be reached by its strict prohibitions. However, even if it be assumed, *arguendo,* that the prohibition on probation of the narcotics statute applies only to cases falling under the Federal Probation Act (18 U.S.C. 3651)—and obviously it applies at least to them—it would make no difference here since even with respect to youth offenders the ultimate source of probation authority is the general probation statute.

The federal courts have no non-statutory authority to grant probation. Their power in this respect derives wholly from the Probation Act of 1925, 43 Stat. 1259, now 18 U.S.C. 3651. Prior to 1925, no such power existed. *Affronti* v. *United States,* 350 U.S. 79, 80, 83 (1955); *Ex parte United States,* 242 U.S. 27, 41–42 (1916). *A fortiori,* no such power exists today in the absence of statutory authority.

It is clear that the Youth Corrections Act did not, and was not intended to, create a grant of power independent of the general probation statute. The Youth Corrections Act recognized that young offenders should be afforded a type of treatment not available to adults. To accomplish this, it added to the means of sentencing available to the court the additional one of treatment under the supervision of the Youth Division of the Board of Parole. (18 U.S.C. 5006–5026.) Specific reference is made in the statute to the fact that the court may still avail itself of (1) the regular sentence of imprisonment, and (2) suspension of the imposition of sentence and probation.[3] Thus section 5010(a) enumerates the probation alternative, and section 5010(d) lists the imprisonment

[3] Congress undoubtedly wished to avoid any confusion on this score in view of the proposals contained in the Model Youth Authority Act (ALI Model Youth Correction Authority Act (1940), Introductory Explanation, p. xvi; section 13; comment on section 30) that the power of the judge to grant probation to youthful offenders be entirely supplanted by the new Youth Authority. This had caused much judicial and other opposition. See Appendix, especially pp. 25 and 28–29.

alternative.[4] But that is not to say that under the Youth Corrections Act these alternatives are available where they otherwise would not be. That this is so is made quite clear by section 5023(a) which provides:

> (a) Nothing in this chapter shall limit or *affect* the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or *affect* the provisions of chapter 231 of this title * * * relative to probation. [Emphasis added.]

It is apparent, therefore, that the otherwise existing powers of the court are not affected by the Youth Corrections Act: they are not diminished thereby nor are they enlarged. Specifically, if an offender is eligible for probation under the general probation statute, he is still eligible, notwithstanding the fact that he is a youth offender. But if the offense is one for which probation is not allowed, the Youth Corrections Act does not empower the courts to grant it.

Moreover, it is not likely that Congress would have intended 18 U.S.C. 5010(a) as a grant of probation apart from chapter 231, 18 U.S.C. (the probation chapter). For if it did, none of the procedural and substantive provisions of chapter 231 would apply to one to whom probation is granted under 5010(a); that is, there would be no listing

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[4] 18 U.S.C. 5010(d) provides:

"(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision."

of the duties of probation officers; no authority for a probation officer to arrest for cause without a warrant those under his supervision; and a lack of other provisions which are no doubt necessary to a smoothly functioning probation system. Thus, unless it be assumed that the sentencing judge must set up the requisite machinery every time he sentences a youth offender under section 5010(a), that section must be deemed a part of the machinery set up by chapter 231. One of two consequences must flow from this conclusion: (1) that section 5010(a) has no effect whatever, for any effect it would have would be upon chapter 231 (i.e., section 3651 thereof), and this cannot be in view of the prohibition in section 5023(a) that the Youth Corrections Act shall not "affect the provisions of chapter 231 * * *"; or (2) that section 5010(a) amends, and becomes a part of, chapter 231, and thus, in turn, is affected by the prohibition on probation in 26 U.S.C. 7237(d), which, as we have noted, applied at the very least to the general grant of probation contained in section 3651 (see p. 11, *infra*).

The legislative history of the Youth Corrections Act supports this interpretation. The Report of the Committee on the Judiciary to accompany S. 2609 (House Report No. 2979, Vol. 2, U.S. Code Cong. & Ad. News, 81st Cong., 2d Sess., pp. 3983, 3985) states:

> * * * * The problem is to provide a successful method and means for treatment of young men between the ages of 16 and 22 who stand convicted in our Federal courts and are not fit subjects for supervised probation—a

method and means that will effect rehabilitation and restore normality, rather than develop recidivists.

Those statements from the hearings on S. 2609 which define the relationship of the Youth Corrections Act to probation are set out in the Appendix, pages 17–26. Also included in the Appendix at pages 27–33 are statements from hearings conducted by subcommittees of both the Senate Judiciary Committee on S. 895 and the House Judiciary Committee on H.R. 1140, in the 78th Congress, First Session. The latter bills were not submitted to Congress, but they both contain provisions identical to those of the present Youth Corrections Act showing the relationship of the new sentencing powers to probation.

All of the statements from both sets of hearings consistently demonstrate that the new method of treatment afforded by the Act did not include probation, although a judge was not precluded from granting probation if he otherwise had the authority to grant it.[5]

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[5] This was clear also to George J. Reed, first Chairman of the Youth Corrections Division of the United States Board of Parole, for he stated in an article on the Youth Corrections Act in Federal Probation, Vol. XVIII, Number 3 (September 1954), at page 12:

"After the conviction of a youth offender the court may:

"1. Suspend imposition or execution of sentence and place the youth offender on probation, for which purpose the Probation Act is available."

Note Flow Chart of Operations under Youth Corrections Act at page 13 of that same article.

Similarly, Orie L. Phillips, Chief Judge, United States Court of Appeals for the Tenth Circuit and Chairman of the Sub-

In short, (1) the Youth Corrections Act does not contain an independent grant of power to suspend the imposition of sentence and to place the offender on probation, (2) if there is any such power it resides in the general Probation Act, 18 U.S.C. 3651 (3) the prohibition on probation in the Narcotics Control Act of 1956, at a minimum, applies to the provisions of the general Probation Act; therefore, (4) a youth offender is as much affected by the prohibition on the grant of probation under section 3651 as an adult offender; *i.e.,* probation is not available as a sentence if he is convicted of importing heroin illegally.

II. This court has jurisdiction

A. An appeal lies from the grant of probation

The judgments of the District Court were entered May 16, 1960; notices of appeal were filed June 3, 1960.

Appeal is sought from this judgment under 28 U.S.C. 1291, which provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

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committee on Youth Offenders of the Committee on Punishment for Crime of the Judicial Conference of the United States which drafted the Youth Corrections Act, spoke of the Act as a "complement to our probation system" in an article in Federal Probation, Vol. XV, Number 1 (March, 1951) at page 3.

See also, Appendix, pp. 17–33.

While the Government's right to appeal in criminal cases is governed by 18 U.S.C. 3731, the Criminal Appeals Act, it has been held many times that where an order relating to a criminal case is essentially independent thereof it may be appealed outside the Criminal Appeals Act. Thus, the Supreme Court stated in *Carroll* v. *United States,* 354 U.S. 394 (1957) at 403:

> It is true that certain orders relating to a criminal case may be found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus be appealable on the authority of 28 U.S.C. 1291 without regard to the limitations of 18 U.S.C. 3731 * * *

See also *Stack* v *Boyle,* 342 U.S. 1 (1951); *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541 (1949).

The instant case comes squarely within that rule. The order of the court suspending the imposition of sentence and granting probation can clearly be considered separately from the judgment of conviction. The defendant having been found guilty on her plea of guilty, the Government obviously is not appealing from that decision, and the question of her guilt can be considered separately from the legality of her sentence. *United States* v. *La Shagway,* 95 F. 2d 200 (9th Cir., 1938); *United States* v. *Cook,* 19 F. 2d 826 (5th Cir., 1927), *affirmed,* sub nom, *United States* v. *Murray,* 275 U.S. 347; *United States* v. *Albrecht,* 25 F. 2d 93 (7th Cir., 1928); *Stack* v. *Boyle,* 342 U.S. 1 (1951); and *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541 (1949).

It should be noted in this connection that there are a number of sentencing problems in which the Government has an interest which should be protected, if necessary, by appeal. This includes not only the restrictions against probation in 18 U.S.C. 3651 and 26 U.S.C. 7237(d), but also those pertaining to offenses which have a mandatory minimum penalty.

B. If an appeal does not lie a writ of mandamus should issue

If the Government has no right to appeal the judgment of the lower court, this Court has jurisdiction to issue a writ of mandamus under 28 U.S.C. 1651,[6] directing the District Court to sentence these defendants in accordance with the provisions of the statute under which they were convicted.

Judge Carter's action in granting probation was illegal. More, since the power of a court to grant probation derives from Congressional enactment, the action of the court below also violated the principle of the separation of powers. In *Ex parte United States,* 242 U.S. 27, 42 (1916), the Supreme Court issued a writ of mandamus restraining a District Court from suspending sentence where a minimum penalty was required by statute. The Supreme Court found the District Court's practice to be inconsistent with the Constitution because it "amounts to a refusal by the

[6] 28 U.S.C. 1651 provides:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

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judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution." 242 U.S. at 52. In like manner, the Courts of Appeals have power to issue writs of mandamus to District Courts to insure "proper judicial administration in the federal system." *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249, 259–260 (1956); *United States* v. *District Court,* 334 U.S. 258, 263 (1947); *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 26 (1942).

To be sure, the Court has discretion on whether to issue a writ, but the situation here is such that it is even more imperative that such relief be granted than it was when the Supreme Court granted similar relief in *Ex parte United States, supra.* There the Court restrained the lower court because it was suspending the imposition of sentence where Congress had not specifically said it could; here, the District Court has suspended the imposition of sentence and has granted probation where Congress has specifically prohibited it from so doing.

If the no-probation provisions of the Narcotics Act seem harsh, any amelioration is of course for Congress.[7] Moreover, the alternative to probation is not a term in the penitentiary. Judge Carter may use the available treatment provisions of the Youth Corrections Act and sentence defendants under 18 U.S.C. 5010(b). This would require them to be placed in the

[7] As this Court stated in *Tanzer* v. *United States*, 278 F. 2d 137, 140 (9th Cir., 1960), Congress undoubtedly intended that the Act be harsh.

custody of the Youth Corrections Division initially for a period of time, usually thirty days, for purposes of classification. During this time the Division would make a complete study of them, including a physical and mental examination, to ascertain their personal traits, their capabilities, pertinent circumstances of their school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to their delinquency (18 U.S.C. 5014). At the conclusion thereof, they would be interviewed by a member of the Division, and a decision would be made on whether to release them conditionally, transfer them to an appropriate agency or institution for treatment, or order their confinement and treatment within the Division (18 U.S.C. 5015). Should the Division see fit to release them conditionally, they would be supervised by a United States Probation Officer, who would have the benefit of the comprehensive study made during the classification period. It is reasonable to assume that this would result in a more fruitful period of supervision, thus better assuring their adjustment to a normal life. If they are not conditionally released at the end of their classification period, it would be because the Division believes that they would benefit more from treatment under closer supervision.

In *United States* v. *Carter,* 270 F. 2d 521, 524 (9th Cir., 1959), this Court declined to grant mandamus relief "on the ground that because of the lapse of time and of defendants' long reliance on judgments *only recently challenged,* the setting aside of the district court orders would work a substantial hardship on

the affected parties." [Emphasis added.] In that case two of the defendants had been on probation over a year and the third, a girl, had been on probation only a little more than four months, but she had since married. In this case, the defendants were placed on probation by orders of the district court filed May 16, 1960. Motions to correct these illegal sentences were made on May 18, 1960, and denied on May 24, 1960. Notices of appeal were promptly filed thereafter on June 3, 1960 (R. 15, 16). Defendants' reliance on the judgment of the district court in this case should have been short-lived, as the challenge came only two days after the orders were filed. Even when this challenge was defeated, the prompt action of the Government in filing notices of appeal should have raised the possibility that the probation order might be set aside by the Court of Appeals. Clearly, the situation in this case is different from that which caused the Court to deny the Government's petition in the previous *Carter* case.

Petitioner-appellant respectfully calls the Court's attention to the significance of the fact that the appellees are the fifth and sixth defendants illegally placed on probation in practically identical cases which were brought to the attention of this Court since June, 1959. In the previous *Carter* case there were three such defendants and last month the Court heard oral arguments on a fourth case in *United States* v. *Helen Mae Lane,* No. 16, 874. All of these cases are from the District Court for the Southern District of California. It may fairly be assumed that that court will continue in its invalid position unless this Court

decides the issue on a review such as is sought herein. The result will be that probation will be granted to narcotics youth offenders in California but nowhere else in the nation at a time when great effort is being expended in the name of justice to achieve uniformity in sentencing.

CONCLUSION

It is respectfully requested that Judge Carter's orders suspending the imposition of sentence and placing Kenneth Eugene Gibbs and Ronald Charles Wachs on probation for a period of five years be reversed and the case remanded with instructions to sentence in accordance with applicable law; or, in the alternative, that a writ of mandamus issue to compel Judge Carter to exercise the judicial discretion entrusted to him in a manner not inconsistent with the specific directive of the Narcotics Act.

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OCTOBER 1960.

APPENDIX

Index to Appendix

I. Correctional System for Youth Offenders

HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, EIGHTY-FIRST CONGRESS, FIRST SESSION, ON S. 1114 AND S. 2609

Statement of Bolitha J. Laws, Chief Judge, United States District Court for the District of Columbia[1]

[P. 13] Judge Laws. As to sentencing of youth offenders, in addition to the judge's present power to place on probation or to sentence under existing statutes, the bill gives him three new alternatives in handling offenders under 24. First, the judge may commit a youth offender for diagnoses and treatment under this act for an unspecified period up to 6 years, with provision that he be tried on conditional release within 4 years.

Secondly, if the judge feels that a youth offender convicted of an offense calling for a long term under existing statutes might not respond to treatment within 6 years or that so short a term might have an adverse effect on enforcement of the law, he may set any maximum authorized by law but still give the offender the benefits of treatment under this act.

Thirdly, if the judge wants more information on a youth offender before sentencing him, he may order a thorough pre-sentence diagnosis at a classification center set up by the Bureau of Prisons.

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[1] Died, November 14, 1958. Although a member of the Committe on Punishment for Crime, he was not a member of the subcommittee on youth offenders which drafted this legislation. Nevertheless, Judge Phillips acknowledged his assistance (Hearings, 81st Cong., p. 62).

It should be noted that the bill in no way reduces the authority or interferes with the sentencing power of the judges.

Statement of James V. Bennett; Director, Bureau of Prisons

[P. 25] Mr. BENNETT. The judge under this bill can now place the man on probation, he can sentence him as a youth offender for a maximum of 6 years or he can sentence him as a youth offender for whatever maximum the statute will permit.

Statement of Hon. John J. Parker, United States Circuit Judge[2]

[Pp. 43–44] Judge PARKER. I would like to speak briefly, if I may, first in analyzing the act and second giving the reasons why I think the act is desirable.

In the first place the act deals only with offenders under 24 years of age. In the second place, it does not interfere with the power of the judge even with respect to those offenders, but gives him merely an alternative method of treatment of those people. That is to say, under this bill the judge may still admit the youthful offender to probation. There is nothing in the bill that prevents that. He may still give the youthful offender the punishment prescribed by existing statutes, there is nothing in the bill that prevents that. All that the bill does is to provide that if in his judgment and discretion, he thinks that the offender before the court is one that can be treated with advantage under this bill, he can sentence him under this bill instead of under existing law.

[2] Died March 17, 1958. He was Chairman of the Committee on Punishment for Crime of the Judicial Conference at the time the subcommittee drafted the Youth Corrections Act.

He may give him, under this bill, what was called corrective treatment and by corrective treatment we mean three things: First, with respect to the classification of the offender for purposes of punishment; second, with respect to the kind of punishment that is going to be inflicted; and third, with respect to his rehabilitation in society after his punishment has been served.

In the first place when a man goes to a correction center under this act he is studied by experts with respect to his physical and mental characteristics and his background and is assigned to an institution where he will be able to receive the kind of corrective treatment that he needs. I will say right there that the bill provides, not only contemplates but expressly provides, that there is to be a separation made between these men and the ordinary hardened offenders that are sentenced to prison, so that the young man under 24 years of age who has strayed from the path of virtue but is not hopeless, can be brought back to good conduct and not subjected to the baleful influence of being associated with hardened criminals in prison.

Now the next thing that it does is provide that he shall be given work training and adequate supervision during his period of incarceration. He is to do useful work, not for just a few hours a day, but real work. He is to do it in a way that will train him for a useful life after he leaves the institution. He is to be taught a trade, in other words.

In the third place, he is to be actively and effectively supervised by men who are trained by handling youth of that character.

The third thing that the act contemplates is conditional release. After a man is sentenced, irrespective of the time provided in the statute defining the crime, if he is sentenced under this act he is sentenced to at

least 6 years of corrective treatment even though the act may prescribe only 2 years' punishment. When he goes in under this system he may be kept under its supervision for 6 years. But he may also be released at any time. The next day after he is imprisoned, if the authorities think he ought to be released he may be released at once, conditionally, that is to say if he does not behave himself he can be brought back to jail again.

After he has been in confinement for a year he can be released unconditionally if it is thought proper. But, the act provides that whatever the situation he shall be released at least conditionally at least 2 years before the expiration of the sentence so that he can be observed and supervised as he enters into the life of society again.

Now there is one provision in this bill that was not in the other bill. It was thought that perhaps 6 years would not be long enough for some offenders, some judges might think that a man needed more treatment than for 6 years and under those circumstances they can give him a period of treatment not exceeding the maximum punishment prescribed in the act.

Mr. Chairman, that is roughly the provision of the act as I understand it. I do not see any possible objection to it. They say that there are some of these fellows that ought to be given serious punishment notwithstanding their being young and it does not prevent their being given serious punishment. Nothing prevents a man from getting 25 years punishment if he deserves it. Nothing prevents his being executed if he deserves such sentence.

On the other hand, there is nothing to prevent the judge from sentencing him to probation if he thinks that is to be done.

All it provides is that in the case of those who need treatment, in the opinion of the judge, the judge shall be able to give them that treatment and reclaim them to society.

* * * * *

[P. 49] Judge PARKER. Of course, there are some of them that ought to be punished and there is nothing in the bill that prevents that. Some of them might be given probation without any further punishment; there is nothing that prevents that.

But, there are many of them that can be reclaimed for society by intelligent treatment, and the purpose of this bill is to make that possible.

* * * * *

Statement of Hon. Carroll Hincks, United States District Judge[3]

[P. 52] Judge HINCKS. In other cases probation has been tried and it has not been enough. In some cases it has been enough. Well, certainly the only question before me there was probation or a moderate sentence. I certainly would not want to send the boy to a jail, he had not rated that yet.

Under those circumstances there was more chance that his character would be warped than straightened. I am pretty sure I put him on probation because there really was not any other sensible thing to do.

Senator KILGORE. In other words, it was the lesser of two evils?

Judge HINCKS. Yes.

Now if this act had been in effect I am very sure I should have resorted to section 5010 which says:

> If the court desires additional information as to whether a youth offender will derive benefit

[3] Appointed to United States Court of Appeals for the Second Circuit on October 3, 1953 and now retired.

> from treatment, it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within 60 days from the date of the order, or such additional period as the court may grant, the division shall report to the court its findings.

Senator GRAHAM. That would give you a follow-up on the boy too?

Judge HINCKS. That would give me a sounder basis for making my decision. As it was, I had nothing but hope to go on. While I feel that hope is better generally than despair, it is not as good as reasoned experience.

Statement of Orie L. Phillips, Chief Judge, United States Court of Appeals, Tenth Circuit[4]

[P. 60] Judge PHILLIPS. I am not unmindful that rapid strides have been made in recent years toward a more scientific teratment [sic] of offenders under the Federal system. New institutions make possible some classification and segregation of classes. Many offenders of the type suitable to be placed under supervised probation are being rehabilitated by the effective work of probation officers. Nevertheless, I am convinced that the system is in many respects defective with respect both to personnel and facilities for the handling of youth offenders.

Most of the causes which contribute to antisocial conduct of youth offenders in the period between adolescence and maturity disappear when the youth reaches full maturity. Our problem is to provide a successful method and means for treatment of young men between the ages of 16 and 23 who stand con-

[4] Now retired. He was chairman of the subcommittee on youth offenders which drafted the Act.

victed in our Federal courts and are not fit subjects for supervised probation—a method and means that will effect rehabilitation and restore normality, rather than develop recidivists.

S. 2609 is designed to provide methods and means that will effect such rehabilitation and restore normality. It is not experimental. It is based on the principles and procedures developed under what is known as the Borstal system in England, which has been in successful operation since 1794.

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It defines "youth offender" as a person under the age of 24 years at the time of conviction. It defines "treatment" as corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders.

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[P. 61] Under its provisions, if the court finds that a youth offender does not need treatment, it may suspend the imposition or execution of sentence and place the youth offender on probation. Thus, the power of the court to grant probation is left undisturbed by the bill.

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[P. 69] Senator KILGORE. Eleven contended that this thing overlapped and duplicated efforts and services now rendered by the Federal Parole and Probation Departments.

Judge PHILLIPS. Of course, if they are put on probation they are not touched by this act.

Supervision of a person conditionally released under this act or released under the Parole Board, is the same type of supervision except that we hope it will be an improved supervision.

II. Federal Corrections Act and Improvement in Parole

HEARINGS BEFORE SUBCOMMITTEE NO. 3 OF THE COMMITTEE ON THE JUDICIARY—HOUSE OF REPRESENTATIVES, 78TH CONGRESS, 1ST SESSION, ON H.R. 1139 AND H.R. 1140

Statement of Hon. John J. Parker, Senior Circuit Judge, Fourth Judicial Circuit

[P. 6] In 1927 we passed the probation law, which authorizes the judge, in passing sentence, instead of incarcerating the prisoner, to admit him to probation under such terms as may be just or as may be helpful in his reformation. That has been a very successful piece of legislation. I shall not go into the statistics with regard to it, but I think that none who has observed the Federal courts since 1927 can have the least doubt but that the Federal probation laws have been salutory. But we have realized something in addition to that is necessary.

There are three defects in the present system of sentencing in the Federal courts. The first is a lack of sufficient knowledge on the part of the sentencing judge.

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[P. 7] Now, the second defect is the diversity in length of sentences.

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Then the third is this: There is in the present system an absolute lack of coordination between the sentencing and the paroling authorities.

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[Pp. 8, 9] I am speaking now of H.R. 2140; yes.

Now, with respect to criminals generally, the bill says this: We leave probation exactly where it is,

that is, in the hands of the district judge. His exercise of the power of probation is not subject to review by anyone.

[P. 11] The board is authorized to admit such youth offender to probation under supervision at any time that it sees fit, and is required to admit him to probation under supervision after he has served 4 years. For the remaining 2 years he is under the supervision of the Federal parole officer, subject to reincarceration if he does not behave himself.

Statement of Francis Biddle, Attorney General of the United States[5]

[P. 17] No less important than the proposal with respect to adult offenders is that portion of the bill which would extend the treatment methods available to the trial judge to the case of offenders under 24 years of age. Based in large measure upon the study and recommendations of the American Law Institute, the bill authorizes the judge to sentence the youth to the custody of a division of the proposed board for special treatment and supervision. The court is not required to follow this course. As in the case of adult offenders, sentence may be suspended or the defendant may be placed on probation, or, indeed, the court may sentence the youth as it would an adult under the first title of the bill. The special treatment authorized is merely an additional possibility to be employed in cases where the youth will benefit from the type of special treatment and supervision contemplated for his rehabilitation.

[5] His term ended June 30, 1945.

Statement of Hon. Orie L. Phillips, Senior Circuit Judge, Tenth Judicial Circuit

[P. 31] Under the provisions of title III, if the court finds that a youth offender does not need treatment, it may suspend the imposition or execution of sentence and place the youth offender on probation. Thus, the power of the court to grant probation is left undisturbed by the bill.

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[Pp. 34, 35] Mr. ROBSION.[6] Does the court have to sentence a youth offender to the Authority?

Judge PHILLIPS. No; the court may place the youth offender on probation. He may sentence him to the Authority if he thinks he would derive benefit from correctional treatment. But if he concludes the youth offender should not be either placed on probation or sentenced to the Authority he may sentence him as any other offender under title II of the act.

Mr. ROBSION. But does the court have to sentence him to the Authority?

Judge PHILLIPS. No; the matter is in the court's discretion. He can place him on probation, he can sentence him to the Authority, or he can sentence him under title II.

Mr. ROBSION. Can the court's action in placing the youth offender on probation be reviewed?

Judge PHILLIPS. No; when the court places an offender on probation that is the end of it, unless the judge revokes the probation and re-sentences him.

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[P. 37] Mr. CRAVENS.[6] Does this bill in any way affect the so-called probation system?

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[6] Representatives John M. Robsion of Kentucky and Fadjo Cravens of Arkansas. They were not members of the subcommittee.

Judge PHILLIPS. Not at all.

Mr. CRAVENS. There is no attempt to disturb that?

Judge PHILLIPS. No, sir; we found it was working well and concluded it ought not to be disturbed.

Mr. CRAVENS. And this bill was drafted with that in mind?

Judge PHILLIPS. Yes, sir. It leaves it absolutely undisturbed.

Statement of Hon. Bolitha J. Laws, Associate Justice, District Court of the United States for the District of Columbia

[P. 66] In any case of that sort the judge may do one of two things. He may sentence the defendant as an adult offender. That means that he would go through this process that we just mentioned, or he may say "I believe this boy shows promise of rehabilitation, and I would like to try the treatment on him by this Youth Correction Division."

In the event he turns that boy over to the Youth Correction Authority, that ends the judge's control over him. This was brought out yesterday. It is optional with him. He does not have to do it. But, if he does it, that ends the judge's connection with the case.

Statement of Hon. Carroll C. Hincks, United States District Judge for the District of Connecticut

[Pp. 74, 75] Title III. Youth Offenders (H.R. 2140)

Under existing law (as indeed under the proposed bill) a judge can, when he thinks it wise, admit a youth offender to probation under a suspended sentence. Thus without title III a judge has ample power to make a lenient disposition of a case.

And under existing law (as also under the proposed bill) the judge has ample power to sentence the youth offender as an adult and thus accomplish his confinement in a Federal reformatory or penitentiary where he will be in company with upward of a thousand other inmates, some as old as 30, or in a local jail housing the sewage of local humanity. Thus without title III, the judge has power to make a drastic disposition of a case.

But time and again it has been my distressing experience to have to deal with a youth offender deserving neither the lenient nor the drastic treatment which alone is now available. In this dilemma, and faced with the alterantive of a drastic treatment which I felt was neither deserved nor helpful, I have sometimes felt constrained to dispose of a case with a probationary term even when I believed firmer treatment desirable. And I might add that occasionally in such cases my forebodings have come to pass, and the youth offender, at large under probation, has again offended.

Against this background, I feel that title III of the act will be a godsend to the judge as providing an ideal disposition for the usual youth offender. Under its provisions, he will get needed discipline and training with a minimum exposure to contaminating influences, and will be returned to this normal environment under experienced supervision as soon as the state of his character development shall warrant.

Thus whatever title III may accomplish, certainly its effect will not be to coddle the youth offender. On the contrary, it will normally bring about his firmer treatment by removing the sentencing judge from the dilemma just referred to.

Reference Notes on the Federal Corrections Act (Submitted by James V. Bennett, Director, Bureau of Prisons)

[P. 140] The English Borstal System

The idea of such a youth authority is not new, either in theory or practice, in this country or abroad. For example, the system of Borstal institutions in England, a group of 10 training schools for older adolescents, 16 to 23, with a variety of treatment methods ranging from open institutions with a maximum of individual freedom and community participation to an institution of maximum security not unlike our reformatories for older offenders, has for 35 years operated with a classification and observation center under the supervision of trained workers. Youthful offenders for whom Borstal rather than probation or penal treatment is considered, are committed by the judge to the care of a board and sent to a central receiving station.

III. Federal Corrections Act

HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 78TH CONGRESS, FIRST SESSION, ON S. 895

[Pp. 5–6] *Statement of Hon. John J. Parker, Senior Judge, United States Circuit Court for the Fourth District*

I think I should describe the system that we have worked out for the dealing with the offenders generally. We do not interfere with the judge's right to admit any convicted person to probation. We let the probation and the judge's power over the probation law stand exactly as it is.

[P. 24] *Statement of John R. Ellingston, Representing the American Law Institute, Philadelphia, Pa.*[7]

Mr. ELLINGSTON. In that connection, it should perhaps be emphasized, in a manner that Mr. Bennett may not feel free to do, that the Federal system has developed in its institutions a system of diagnostics in 30 institutions scattered throughout the country, meaning that every court would have relatively nearer at hand a center to which the individual would be committed for that initial study and that study is not just a psychiatric study. It is a month-long intimate contact with this individual. If it is properly done, it is a completely different approach from saying that some specialist, instead of a judge, is going to have an opinion. It is a matter of getting to know the whole background, the family life, the work habits, the education, as well as the psychic and physical condition of the individual before you make your decision.

That is why, for all age groups, of course, the courts retain the power of probation. Sometimes he will make mistakes but if he has an individual about whom he feels uncertain, he can feel with some security that he can turn him over to the youth authority or this board with the knowledge that he is going to be studied and the disposition is going to be what is best for the individual, with a knowledge that he cannot himself give that case as a judge.

[7] Special adviser to the youth authority program of the American Law Institute, which drafted the Model Youth Authority Act.

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